

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL REVISION APPLICATION No. 168 of 1994****For Approval and Signature:****HON'BLE MR.JUSTICE C.K.BUCH**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - Whether this case involves a substantial question of law as to the interpretation of the
 - 4 constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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ISMAILBHAI ALLARAKHABHAI MANSURI - Applicant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

MR BA SURTI for Petitioner No(s).: 1.

Mr. LR Pujari, Addl. PUBLIC PROSECUTOR for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date : 20/07/2005

ORAL JUDGMENT

1. Ld. Counsel Mr. BA Surati appearing for the petitioner accused is not present. Since the present Cri. Rev. Application is against the judgment and order

conviction and sentence, the same can not be dismissed for want of prosecution. So, this Court has decided the matter on merits.

2. Heard. The present Cri. Rev. Application has been preferred by the petitioner -original accused challenging the order of conviction and sentence passed by the ld. JMFC, Idar dated 09.07.1993 convicting the respondent accused and confirmed by the ld. Addl. Sessions Judge, Sabarkantha at Himmatnagar in Criminal Appeal No.18/1993 whereby the ld. Addl. Sessions Judge dismissed the appeal and confirmed the order of conviction and sentence passed by the ld. JMFC.

3. The ld. JMFC, Idar vide judgment and order dated 09.07.1993, convicted the respondent accused for the offences punishable under sections 297, 337, 338, 3-4-A of the IPC and sections 177 & 184 of the Motor Vehicles Act. The ld. JMFC inflicted different offences for different offences and maximum sentence imposed by the ld. JMFC is R/I for 1 Year for the offence punishable under section 304-A of IPC and total amount of fine imposed comes to Rs.1800/-. Ld. JMFC also imposed sentence in default of payment of fine as narrated in the impugned judgment and order.

4. The case of the prosecution is that on 07.01.1992,

the petitioner accused had driven his jeep car (taxi) bearing No. GRN 518 carrying passengers in rash and negligent manner on Himmatnagar State Highway No.9 at 9.15 A.M. proceeding towards Himmatnagar from Idar and dashed with the tree on the left hand side of the road as a result of which passengers travelling in the jeep car sustained injuries and out of them, two passengers namely Hirabhai Revabhai and Bhavnaben Vinodbhai succumbed to injuries. The investigating agency, after recording statements of injured witnesses lodged complaint against the petitioner accused for the offences referred to above and ld. JMFC, after appreciating oral as well as documentary evidence adduced by the parties in Cri. Case No. 397/1992, vide impugned judgment and order dated 09.07.1993, convicted the petitioner accused and sentenced him as stated in para-3 above.

5. Being aggrieved by the same, the petitioner accused preferred Criminal Appeal No. 18/1993 challenging the impugned order of conviction and sentence. However, ld. Addl. Sessions Judge, Sabarkantha at Himmatnagar, vide judgment and order dated 11.04.1994, dismissed the said appeal and confirmed the order of conviction and sentence recorded by the ld. JMFC. Being aggrieved by both the

judgments and order, the petitioner accused has preferred present Cri. Rev. Application.

6. This is a case of two concurrent findings of facts recorded by both the Courts below. In the incident in question, one passenger named Bhavnaben has lost her life. The fact that the vehicle dashed with a standing tree as per panchanama drawn by the police, clearly reveals that the vehicle was being driven in rash and negligent manner. The fact that wheel of the jeep car had come out at the first dash with the standing tree, reveals the excessive speed and rash and negligent manner in which the vehicle was being driven. So, both the courts have rightly rejected the defence plea of mechanical failure. It is specifically observed that the tree is situated on the eastern side of the road as per the panchanama and map and jeep was found at the present site when panchanama was drawn. This situation is capable of drawing an inference that the vehicle must have been dashed with a standing tree first which was on the eastern side of the road, otherwise the other speaking circumstances would not have found viz. presence of marks of hit by the bonnet of jeep car on the tree as well as particals of trees found on the bonnet of the jeep car. More than one witness has said that the jeep was being

driven in an excessive speed. It is further revealed that there is cross-roads just near the place of incident. It is not emerging from the record that the incident had occurred because the driver had tried to save somebody's life or anybody's contribution has put the driver in such a situation and, therefore, he was compelled to take some deviation from the regular track on which the jeep was being driven. So, the finding recorded by both the courts had strong logic and facts available on record and, therefore, the Court finds no merits in the Revision Application, so far conviction recorded against the petitioner is concerned.

7. The incident is of the year 1992. The petitioner accused has remained on bail for about more than 13 years. Considering the condition of road on those days and other totality including the age of the accused and nature of profession through which he was earning his bread and the fact that he himself had sustained injuries, this is a fit case that though order of conviction is confirmed, the order of sentence imposed by the ld. JMFC and confirmed by the appellate Court requires to be reduced to some extent to meet the ends of justice and to that extent, present Cri. Rev.

Application requires to be allowed.

8. in view of above, the Cri. Rev. Application is dismissed. The impugned order of conviction recorded by ld. JMFC and confirmed by the ld. Addl. Sessions Judge, Sabarkantha at Himmatnagar, is hereby confirmed. However, order imposing substantive sentence maximum for 1 Year is hereby reduced to respondent/I for 6 (six) months for the offence punishable under section 304-A of the IPC. Rest of the order of sentence and imposition of fine stands unaltered. The petitioner accused was on bail pending trial and was on bail pending appeal and also was enlarged by this Court pending the hearing and final disposal of present Cri. Rev. Application, on the day on which this Court admitted Cri. Rev. Application. In view of above, the petitioner is directed to surrender before the trial Court to undergo sentence within 15 days from the date of signing of this judgment failing which the trial Judge shall issue Non-Bailable Warrant against the petitioner accused.

9. Rule is made absolute to the aforesaid extent.

(C.K. BUCH, J)

*rawal

21.07.2005 :

10. Before above judgment could be signed, in the last minutes of the working hours of the Court, ld. Counsel Mr. Surati for the petitioner appeared before the Court and submitted that he would like to submit his point of view and, therefore, this Court may not sign this judgment. As no working hours were left, it was not possible to hear ld. Counsel Mr. Surati and Mr. Surti, therefore, was informed by the Court that the judgment is already dictated and nothing more can be done, however, if he wants to make any submissions, then he may submit on the point of quantum of punishment and other relevant aspects on the next day i.e. on 21.07.2005 in writing.

11. Accordingly, ld. Counsel Mr. Surati has submitted written arguments as contemplated under section 314 of CrPC and copy of which has also been served to ld.APP. No arguments on merits should have been considered by this Court in view of the findings recorded in the judgment dictated in the open Court. However, as the judgment has been dictated in absence of Mr. Surati, this Court is inclined to appreciate the say given in writing to the Court. For the same of convenience, some relevant portion of written arguments advanced by ld. Counsel Mr. Surati is reproduced herein below:-

"I. Therefore, it is respectfully submitted that all the prosecution witnesses, who were traveling in

the said jeep and who had received injuries, have deposed that as the wheel was detached from the jeep, the jeep had dashed with the tree and the accident had occurred. That two witnesses have also stated about the speed of the jeep, which is 45 to 50 Kms. Hence, the driver was not driving the jeep rashly and negligently, and therefore, he deserves acquittal.

II. That the Courts below ought to have considered that all the prosecution witnesses have clearly deposed that the wheel had detached from the jeep, and therefore, the jeep dashed with the tree. However, the learned Magistrate has given the wrong finding in his judgment at page number 18 that the P.W. Devikaben Hirabhai has stated that the jeep was running fast, and the wheel of the jeep was detached. That this finding is wrong. Moreover, the learned Magistrate ought to have considered the evidence of all the witnesses as a whole. That has not been considered at all, and he has wrongly come to the conclusion that the petitioner was rash and negligent in driving the jeep, and therefore, the accident had occurred, and accordingly, the learned Magistrate has wrongly passed the impugned judgment and order against the petitioner.

III. That it is respectfully submitted that the learned Additional Sessions Judge had discussed the evidence of all the prosecution witnesses at page numbers 6 and 7 of his judgment.. However, he had considered the evidence of prosecution witness Lilaben Amrutbhai at Ex.21, who had stated that the jeep was running fast and dashed with the tree. That the learned Judge had accepted her evidence and came to the conclusion that the prosecution case is proved, but the facts remain that all the other prosecution witnesses have deposed that the jeep was running at a speed of 45 to 50 Kms., which could be said to be a moderate speed; the wheel of the jeep had detached, and, therefore, the jeep dashed with the tree. Hence, there is no evidence on records of the case that the jeep dashed with the tree and thereafter the wheel came out from the jeep, because even Lilaben Amrutbhai, P.W.4, had also not stated in her deposition that as the jeep dashed with the tree, the wheel had come out. Hence, the prosecution case has not been proved, and therefore, the petitioner

deserves acquittal. "

It has been further stated in the written arguments as under:-

"VI. That the learned Judge ought to have considered that the prosecution has failed to prove the case beyond the reasonable doubt, because the oral evidence of the prosecution witnesses clearly shows that the wheel of the jeep was detached, and therefore, the jeep had dashed with the tree and the accident had occurred. That the panchanama is silent about the marks of the wheel, but it has been described that the wheel was found 8 feet away from the jeep. Moreover, it is a National Highway, and on the highway, the wheel was detached, and therefore, it is difficult to find out the marks of the wheel because of the traffic on the highway. This aspect has not been considered by the Courts below, and it transpires that the Courts below have considered that in the said accident, two passengers have lost their lives and the passed the judgments and orders of conviction. The Courts below have failed to consider that at the same time the other passengers, who were traveling in the said jeep, are the prosecution witnesses and they also have received the injuries in the said accident, but from their evidence it is established that the accident had taken place, because the wheel was detached from the jeep. Hence, the petitioner deserves acquittal.

12. The above submissions of Mr. Surati are not found convincing and ld. Trial Judge as well as ld. Appellate Judge has observed that some prosecution witnesses have attempted to help the accused though more than one prosecution witnesses have positively deposed and no cross-examination on that aspect was made, that the present petitioner was driving the vehicle in question in speed. Even the complaint lodged clearly reveals that the

petitioner was driving the vehicle in question and evidence of one witness namely Leelaben is very clear on the point of speed of the vehicle i.e. jeep car. On the contrary, it is undisputedly clear from the deposition of P.W. Girishbhai Ishwarbhai Patel -Exh.16 and Kantilal Rameshbhai Exh.18 who have tried to save the accused by throwing doubt as to the identity of the accused driver, that the theory of mechanical failure in the vehicle is placed for the first time before the court and some of the witnesses have said that front left hand side wheel had come out from the vehicle suddenly and, therefore, the jeep car dashed with the babool tree. There is no detailed cross-examination of Investigating Officer nor evidence to show that jeep car was ever without wheel as there were marks of axle on the tar road on account of sudden removal of the wheel when jeep car was being driven. Had it been so, marks of axle on the road must have been found, which are not found on the spot. There is no evidence on record to show that marks of dragging of jeep car without tyre on the road on the spot were found. On the contrary, both the courts below have rightly appreciated the facts emerging from the panchanama which also does not reveal about such marks. One more fact which emerges from the record is that when

the petitioner was driving the vehicle, there were about 3 to 4 passengers sitting on the front row by the side of driver's seat. P.W. Girishbhai who has attempted to save the driver was one amongst other such passengers and he has admitted that he was sitting by the side of the driver's seat and Bhavnaben was also sitting on the said seat. In the deposition of Leelaben, it has come on record that father-in-law of P.W. Leelaben was also sitting by the side of driver's seat and she has stated that she herself and P.W. Deviben and her father in law had started for Idar from Himmatnagar in the jeep car and her father-in-law was sitting on the front side. So, how the driver can permit 3 to 4 persons to sit by the driver side seat in front row and in such a situation, the story placed that the driver lost his control and dashed with the babool tree as a result of which tyre of the vehicle came out, is worth believable. The rest of the discussion as to the evidence has been made by this Court in foregoing paras. Merely because, some prosecution witnesses have not supported the case of the prosecution, the case of the prosecution as revealed by the prosecution witnesses should not be ignored. It was possible for the accused to bring evidence by examining expert or some officers from RT0 to show that the

accident had occurred because of mechanical failure and this special plea has been taken by him for the first time during the cross-examination of the prosecution witnesses. Hence, the Court is not convinced that the accused should be given benefit of doubt and the submissions made in this regard in the written submissions to acquit the petitioner accused by giving him benefit of doubt, are not found acceptable.

13. Mr. Surati, ld. Counsel for the petitioner has placed reliance on the following decisions on the basis of which it is argued that the petitioner accused should be given benefit of probation in exercise of powers vested with the Court under section 360 of CrPC and if the conviction is found sustainable, then he should not be sent to jail after a period of several years. He can be asked asked to maintain good conduct and be of good behaviour for a period of an year or two:-

(i) A.P.Raju v/s State of Orrissa, 1995 Supp.(2) SCC 385.

(ii) Aitha Chander Rao v/s State of Andhra Pradesh, 1981 (Supp) SCC 17,

(iii) Becharbhai Rajibhai Parmar v/s State of Gujarat, 1991(2) GLH 153, and

(iv) Jadeja Takhubha Lakhubha v/s State of Gujarat,

1985 GLH (UJ) 17;

14. In the case of Jadeja Takhubha (supra), the accused was of 21 years of age and the Court found that looking to the socio-economical condition, the accused deserves benefit under section 306 of CrPC. In the case of Becharji Raijibhai Parmar (supra), the order of conviction was not seriously assailed in view of two concurrent findings and it was prayed that in view of the ratio laid down by the Apex Court in the case of Bishnu Deo Shaw v/s State of West Bengal, AIR 1979 SC 964, the petitioner may be given an advantage of benefit of section 360 of CrPC. For not giving such advantage, the Court should assign special reasons. In the present case, the petitioner is found negligent from the very beginning i.e. the moment on which he started driving jeep car accommodating 3 to 4 persons by the driver's side seat in the jeep car and he was not able to control the vehicle on the highway. In the case of Becharji (supra), ST Bus collided with a cycle and, therefore, the driver of the bus was prosecuted. So, the driver was not the sole responsible person in the accident, but he was held criminally negligent in driving the vehicle on facts. In the case of Aitha Chander Rao (supra), the Apex

Court granted benefit of section 360 of CrPC on the basis that the ld. Sessions Judge has found that there was some amount of contributory negligence on the part of the appellant and having regard to that particular circumstance, the accused was found entitled to be released on probation. In the same way, in the case of A.P.Raju (Supra), the petitioner was driving the vehicle belonging to Orrissa Road Transport Corporation whereby ST Bus driver could not locate and save deceased and two other children standing near a bunnian tree and the vehicle gave a hit though children were practically on a kachcha side of the road. So, considering the age of the deceased victim and other circumstances, benefit was given to the appellant driver while granting Special Leave to Appeal. However, in the present case, the petitioner was driving a private service vehicle on the State Highway and was driving rashly and negligently. This fact is stated by P.W. Leelaben who has stated that the driver was driving "fast" and dashing was such that skin of babool tree was damaged and left side wheel of the jeep had come out from the vehicle and thereafter also, the vehicle was dragged after dashing upto some feet and wheel was also found at some distance from that place when panchanama was drawn. Merely because the

accident had occurred before some years and the present Cri. Rev. Application could not be heard by the Court for a pretty long time, would not tilt the balance in favour of the petitioner accused. On the contrary, the order sheet reveals that on number of occasions, the matter was adjourned on account of non-availability of the advocates. For short, I do not find any merits even in the written submissions submitted by ld. Counsel Mr. Surati before the court and the Court is not in agreement with the submissions made by ld. Counsel Mr. Surati for grant of benefit of section 360 of CrPC or to grant an advantage under the provisions of Probation of Offenders Act.

15. In the result, Cri. Rev. Application is dismissed as observed above and in previous part of the judgment. The petitioner accused shall act as directed by the Court and shall undergo the sentence as ordered by this Court in para-8 of this judgment.

(C.K. BUCH, J)

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